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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n)	)	
and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile	)	
Services	)	

To: The Commission

REPLY COMMENTS OF THE UTILITIES TELECOMMUNICATIONS COUNCIL

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November 23, 1993

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SUMMARY

The underlying impetus for the amendment of Section 332 was an attempt by Congress to create "regulatory parity" for competing cellular-like services; it is not to "ferret-out" any and all services that contain some for-profit component and subject them to common carrier regulation irrespective of the impact on the underlying service. Accordingly, in attempting to specify the definition of what constitutes a commercial mobile service the Commission should confine its focus to those services for which regulatory parity is needed and should not narrowly define private mobile services.

Virtually all commenters support UTC's recommendation that the FCC categorically exempt traditional private land mobile radio services in which licensees operate mobile radio systems solely for their own private, internal uses. Similarly, shared systems, under which a licensee offers reserve capacity to unlicensed eligible users or where each user of the licensed facilities is individually licensed, should continue to be treated as private mobile services since they operate on a "not-for-profit" basis.

UTC renews its support for an interpretation of "interconnected service" under which interconnected service must be offered at the end user level, i.e., the service must provide subscribers to mobile radio service with the ability to directly

control access to the public switched network for purposes of sending or receiving messages to or from points on the network.

The FCC distinguish between "limited-eligibility" services that are available to a "substantial portion of the public" and services that have significant eligibility requirements that restrict service to small or specialized user groups, e.g., the Power, Petroleum and Public Safety Radio Services.

The ultimate goals of the legislation are best supported by viewing the "functional equivalency" language as an "escape valve" for classifying services as private even if they meet the literal definition of commercial mobile service.

UTC supports the use of individual system capacity and service territory size information for the specific purpose of determining whether a service that technically fits within the definition of "commercial mobile service" is nonetheless not the functional equivalent of a commercial mobile service. UTC recommends that the FCC examine other factors on a case-by-case basis in making this determination.

UTC supports the FCC's proposal to permit existing private land mobile licensees the flexibility to offer either commercial or private mobile service. However, UTC opposes the suggestions of companies with cellular interests that existing common carrier

licensees be permitted to offer either private or commercial mobile services. UTC also opposes permitting licensees to offer both private and commercial mobile services under one license as this would pose administrative problems for the FCC.

UTC urges the FCC to license PCS for both commercial and private mobile services. Public service/public safety entities, such as utilities, have potential applications for private PCS services. Therefore, permitting private PCS to be offered will satisfy a need for such service and encourage the full development of this market.

UTC also recommends that Title II regulation of commercial mobile services be minimized. UTC supports the FCC's proposal to vest all commercial mobile service providers with interconnection rights similar to the rights currently held by Part 22 Public Land Mobile licensees. Additionally, UTC agrees with the FCC's conclusion that the legislation does not restrict the FCC's authority to require common carriers to provide interconnection to private entities. The FCC should not, however, impose interconnection or equal access obligations on commercial mobile service providers.

Finally, UTC urges the FCC to adopt its reorganization plan and establish a Wireless Services Bureau to regulate both the fixed and mobile services of commercial and private systems.

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To: The Commission

REPLY COMMENTS OF THE UTILITIES TELECOMMUNICATIONS COUNCIL

Pursuant to Section 1.415 of the Commission's Rules, the Utilities Telecommunications Council (UTC) hereby submits its reply comments with respect to the Notice of Proposed Rulemaking (NPRM), in GN Docket No. 93-252, FCC 93-454, released October 8, 1993, in the above captioned matter. The NPRM was adopted in order to implement amendments to the Communications Act made by Title VI of the Omnibus Budget Reconciliation Act of 1993 (the Budget Act).[1/]

I. INTRODUCTION AND BACKGROUND

As the national representative on communications matters for the nation's electric, gas, water, and steam utilities, and natural gas pipelines, UTC filed extensive comments in this proceeding.

[1/] Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (1993).

UTC's comments focused on: (1) the statutory definitions of "commercial mobile service" and "private mobile service;" (2) the proper treatment and classification of existing private and common carrier services under these definitions; (3) the classification of future services such as PCS; (4) the degree of Title II regulation that should be imposed on commercial mobile services; and (5) the transitional measures that are necessary to implement these changes, including a proposal to reorganize the FCC's Private Radio Bureau into a new "Wireless Services Bureau." Below, UTC again addresses these issues in the context of the comments filed by the various parties in this proceeding.

II. REGULATORY PARITY DOES NOT NECESSITATE AN EXTREMELY NARROW DEFINITION OF PRIVATE MOBILE SERVICES

In attempting to define and distinguish between "commercial mobile services" and "private mobile services" UTC urged the Commission to be guided by the legislative intent in the adoption of the new statutory language. Contrary to the claims of the Bell Operating Companies and other groups representing the interests of common carriers, such as the Cellular Telecommunications Industry Association (CTIA) and Telocator, a broad and all encompassing definition of commercial mobile service was not the intent of Congress in amending Section 332. As comments by the American Mobile Telecommunications Association (AMTA) and the National Association of Business and Educational Radio (NABER) confirm, the underlying impetus for the legislation

was an attempt by Congress to create "regulatory parity" between cellular-like services.[2/] Accordingly, in attempting to specify the definition of what constitutes a commercial mobile service the Commission should confine its focus to those services for which regulatory parity is needed and should not narrowly define private mobile services.

Thus, while the FCC's task in implementing the regulatory parity provisions are significant, Telocator's hyperbole notwithstanding, it should not be viewed as representing a comprehensive and fundamental redefinition of the regulatory framework for all mobile radio services.[3/] There are over 1.5 million stations and 14 million transmitters licensed for use in the Private Land Mobile Radio Service (representing 40 percent of all licenses issued by the FCC) the vast majority of which are utilized purely on an internal, non-profit basis.[4/] The public safety, public service and core private industry entities that operate these private, internal-use systems should not be impacted at all by the NPRM.

[2/] AMTA, pp. 4-5, 8; and NABER, pp. 6-7.

[3/] Telocator, pp. 5-6.

[4/] Notice of Inquiry, PR Docket No. 91-170, 6 FCC Rcd 4126, 4127 (1991).

A. Commercial Mobile Service Should Not Be Defined So As To Encompass Essentially Private Services

Under the Budget Act a mobile service will be classified as a "commercial mobile service" if it meets two criteria: the service (1) is "provided for profit;" and (2) makes "interconnected service" available "to the public" or "to such classes of eligible users as to be effectively available to a substantial portion of the public."

UTC agrees with Motorola, that the elements of commercial mobile service should not be defined so broadly or applied so literally that they sweep within the commercial mobile service classification services that are used to meet legitimate private communications requirements.[5/]

1. Service Provided for Profit

The first element in the definition of commercial mobile service is that the service must be provided on a "for profit" basis. Virtually all commenters support UTC's recommendation that the FCC should categorically exempt traditional private land mobile radio services in which licensees operate mobile radio systems solely for their own private, internal uses.

BellSouth is the only commenter that opposes a categorical exemption for pure private, internal-use systems. Instead,

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[5/] Motorola, p. 6.

BellSouth proposes a "simple" definition of "for-profit under which only governmental bodies and entities organized solely for non-profit purposes and found qualified by the Internal Revenue Service for tax exempt status would be deemed non-profit for mobile radio service classification purposes.[6/]

In addition to being wildly inconsistent with Congressional intent, BellSouth's proposal would effectively eliminate almost all private radio services. Such a clear attempt to elevate the interests of commercial mobile service providers at the expense of private radio users and the general public should be categorically rejected.

Many commenters support UTC's position that shared systems, under which a licensee offers reserve capacity to unlicensed eligible users or where each user of the licensed facilities is individually licensed, should continue to be treated as private mobile services since they operate on a "not-for-profit" basis.[7/] For example, LCRA notes that non-profit sharing arrangements among entities eligible for licensing under Part 90 of the Commission's Rules have long been recognized as a

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[6/] BellSouth, p. 6.

[7/] AMTA, p. 9; Lower Colorado River Authority (LCRA), p. 4; Nextel, p. 8; Aeronautical Radio, Inc.(ARINC), p. 4; Associated Public Safety Communications Officers (APCO), p. 3; American Petroleum Institute (API), pp. 5-6; Motorola, p. Appendix A; Telocator, p. 9; and Industrial Telecommunications Association (API), p. 5.

legitimate way by which entities eligible in their own right to license particular frequencies could realize economies of scale through the sharing of facilities.[8/]

Moreover, as UTC noted in its comments, this approach is consistent with the language of revised Section 3(n), which provides that "private" communications systems may be licensed on an "individual, cooperative, or multiple basis" (emphasis added).

UTC disagrees with those few commenters, such as Mobile Telecommunications Technologies (MTEL) and Bell Atlantic, who propose that entities involved in a non-profit cost shared system employing a for-profit system manager should be subject to regulation as a commercial mobile service provider. MTEL's argument is apparently based on the flawed and unsupported reasoning that applying commercial mobile service regulations, and therefore some Title II obligations, on these systems will result in a more straightforward and administratively convenient approach for the FCC.[9/] It is difficult to see how the application of additional regulations on a system is less administratively cumbersome than the absence of those regulations.

[8/] LCRA, p. 5.

[9/] MTEL, p. 6.

Similarly, Bell Atlantic argues that the existence of for-profit system managers of non-profit shared-use systems would permit some competing mobile service providers to escape consistent equal regulation.[10/] This argument should be rejected as nonsensical and paranoid. The intent of regulatory parity is to achieve similar regulations for competing services; it is not to "ferret-out" any and all services that contain some for-profit component and subject them to common carrier regulation irrespective of the impact on the underlying service. The fee charged by a third-party system manager is a cost that is shared by the system users and should be considered in the nature of an operational expense. Few, if any, non-profit shared system licensees would employ a for-profit system manager that costs more than it would cost to manage the system by the users in the aggregate.

A large and diverse body of commenters agree with UTC that the Commission should also allow "non-commercial" private radio licensees to lease reserve capacity without being deemed to be acting on a for-profit basis for purposes of commercial mobile service classification.[11/] As NABER notes, the Commission should look to the primary activity of the system and not to any ancillary or secondary undertaking which is used to allow the

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[10/] Bell Atlantic, p. 7.

[11/] API, pp. 5-8; ITA, p.5; NABER, pp. 7-8; Nextel, pp. 8-9; and Motorola, p. 7.

licensee to more efficiently or economically operate its communications system or network.[12/]

Consistent with this approach, UTC continues to recommend that private radio licensees be able to lease reserve capacity provided that at least 51% of the system is used (e.g., as measured by loading, erlangs, etc.) to meet the licensee's own internal requirements and that none of the leased facilities are used to meet the licensee's basic loading requirements. Further, UTC reiterates its recommendation that the Commission consider the adoption of minimum operation/construction requirements that have to be met by an internal-use private land mobile licensee prior to being eligible to lease reserve capacity.[13/]

The primary opposition to the leasing of reserve capacity by private, internal-use system licensees is raised by the large cellular carriers. For example, Bell Atlantic, BellSouth, Southwestern Bell and US West all categorically oppose the provision of reserve capacity on anything but a commercial carrier basis. For example, Bell Atlantic, in its own peculiar slant on the intent of Congress, claims that permitting private operators to sell excess capacity to the public in competition with common carriers providers, and free of common carrier regulation,

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[12/] NABER, pp. 7-8.

[13/] The FCC adopted a similar requirement for non-commercial nationwide licensees in the 220-222 MHz band, 47 C.F.R. § 90.733(d).

creates the very regulatory inequity which Section 332 is intended to correct.[14/]

Again, Bell Atlantic and the other cellular common carriers misstate Congressional intent in amending section 332, which was to create parity among services that were competitive with one another. As ITA states:

> The congressional emphasis on ensuring competitive market conditions suggests that Congress could not have intended the new legislation to alter or affect the regulatory status of private radio services that are not competitive with existing common carrier services.[15/]

According to the Cellular Common Carriers the mere leasing of reserve capacity, no matter how de minimis, somehow renders a private licensee a competitive threat that must be regulated. Significantly, the cellular carriers' true competitors, such as Nextel, that will themselves be regulated on a commercial mobile service basis, do not perceive a need to impose common carrier regulations on internal-use private licensees engaged in the leasing of reserve capacity. Further, Nextel points out that as a practical matter, capacity and internal requirements limit these private licensees so that they cannot offer service indiscriminately to all who request it -- an essential element of

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[14/] Bell Atlantic , p. 7.

[15/] ITA, p. 4.

common carriage.[16/]

Moreover, it is not an issue of leasing capacity on a private rather than common carrier basis. Instead it is the issue of being able to lease reserve capacity at all. Even minimum Title II obligations would render the leasing of private system capacity unworkable for many utilities and other entities with significant public service/public safety requirements. Utilities and other private, internal-use licensees lease reserve capacity not excess capacity: a difference which is of vital operational significance. Utility systems are designed to handle usage requirements that exceed routine operations and therefore often have a certain amount of available "reserve" capacity. Under privately negotiated contracts utilities can maintain priority access to this reserve capacity during emergency situations. However, common carrier obligations would not allow for such contractual arrangements.

2. Interconnected Service

UTC continues to support an interpretation of "interconnected service" under which interconnected service must be offered at the end user level, i.e., the service must provide subscribers to mobile radio service with the ability to directly control access to the public switched network for purposes of sending or receiving messages to or from points on the network.

[16/] Nextel, p. 9.

Among others, this approach is supported by AAR, NABER, and Nextel.[17/]

Further, UTC agrees with NABER that interconnection used strictly for internal control purposes, such as dial-up circuits for transmitter control, should not be considered interconnected.[18/] As noted in UTC's comments, many utilities and pipelines as well as other public service/public safety entities utilize such interconnection as an integral part of their operational system controls.

3. Service Available To The Public

The third and final element of commercial mobile service is that interconnected service be made "available to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public."

Many of the commenters reiterate UTC's recommendations that in drafting regulations to implement this provision the Commission should make a distinction between "limited-eligibility" services that are available to a "substantial portion of the public" and services that have significant eligibility requirements that restrict service to small or specialized user groups, e.g., the Power, Petroleum and Public

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[17/] AAR, p. 3; NABER, p. 7; and Nextel, p. 10.

[18/] NABER, p. 8.

Safety Radio Services.[19/] Even Telocator's comments can be read as supporting a distinction between services such as wide-area SMRs and private carrier paging companies from whom virtually the entire public are eligible to take service, and services with more restrictive eligibility.[20/]

Such a distinction would appear to be the best method to address Congress' concern with regard to creating regulatory parity between services that are available to the public generally and those that are effectively available to a substantial portion of the public, while at the same time preserving the private regulatory treatment of land mobile radio services that are not intended for use by a substantial portion of the public.

C. Private Mobile Service

The comments evidence significant debate regarding the proper interpretation of Section 332(d)(3)'s definition of "private mobile service." UTC agrees with a large number of commenters that the ultimate goals of the legislation are best supported by viewing the "functional equivalency" language as an "escape valve" for classifying services as private even if they

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[19/] AMTA, p. 9; ARINC, p. 5; Motorola, p. 8; NABER, p. 10; Nextel, pp. 11-12; and Reed Smith Shaw & McClay, pp. 2-3.

[20/] Telocator, p. 11.

meet the literal definition of commercial mobile service.[21/]

As Reed Smith notes, the "not" and "or" wording of the statute is precise: if a mobile service is not a commercial mobile service, or if the mobile service is not the functional equivalent of a commercial mobile service, the mobile service is a private mobile service. The word "or" in the statute would have to be "and" if a private mobile service had to "not" be both a commercial mobile service and the functional equivalent of one.[22/]

Commenters attempting to persuade the Commission that the functional equivalency provision expands upon the definition of commercial mobile service are unable to provide a satisfactory explanation of the Conference Report's inclusion of a specific example of a service that meets the literal definition of a commercial mobile service but nevertheless could be treated as a private mobile service because it is not the "functional equivalent" of a commercial mobile service.[23/] For example, US West argues that the Conference language does not support the proposition for which it is cited because it does not describe a

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[21/] AMTA, pp. 11-14; GEOTEK Industries, pp. 5-7; ITA, pp. 3-4; Joint Comments of Advanced MobileComm Technologies and Digital Spread Spectrum Technologies, p. 7; LCRA, pp. 8-10; Motorola, pp. 9-10; NABER, pp. 11-12; Reed Smith, pp. 6-9; Time Warner, pp. 5-6.

[22/] Reed Smith, p. 6.

[23/] Conference Report, 496 (1993).

service that is explicitly provided "for profit" and therefore is outside of the literal definition of a commercial mobile service. However, this rests on the implausible premise that the Senate and House Conference members specifically included this explanatory text of close to 100 words in the Conference Report without any particular purpose.

Finally, it should be noted that from a regulatory point of view the imposition of commercial mobile service status, and therefore Title II obligations, on all services that meet the literal definition of commercial mobile service could act to stifle the ability of smaller service providers to effectively compete against the larger more established commercial providers.

III. REGULATORY CLASSIFICATION OF EXISTING SERVICES

In accordance with the more reasonable, less restrictive definition of "private mobile service", the Commission should classify all not-for-profit traditional private land mobile services as private mobile services. This approach reflects the clear legislative intent not to unnecessarily sweep private mobile services into the commercial mobile service category. Instead, only those services which are truly "commercial" should be reclassified as such.

UTC's approach is generally supported by the parties, including AAR[24/], ITA[25/], AMTA[26/], and EFJ[27/]. Even parties which suggest that an expansive definition of commercial mobile services should be adopted support the classification as "private" of all not-for-profit private land mobile services. NYNEX, for example, supports the expansive definition of commercial but finds that only enhanced SMR service, would necessarily be reclassified as commercial.[28/]

As to the reclassification of specific services, UTC concurs with Motorola that only enhanced SMR, Part 22 paging and Part 90 private carrier paging systems should be recategorized as commercial mobile services.[29/] Other services, such as traditional SMRs, internal paging systems and public safety/public service communications systems should remain private as they are not offered on a for-profit basis or to a broad segment of the public.

UTC opposes Bell Atlantic's suggestion that most services should be classified as commercial in order to fulfill the goal

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[24/] AAR, p. 4.

[25/] ITA, p. 5.

[26/] AMTA, p. 16.

[27/] EFJ, p. 9.

[28/] NYNEX, p. 14-15.

[29/] Motorola, p. 11, Appendix A.

of regulatory parity.[30/] As stated in Section II above, Bell Atlantic's overly simplistic interpretation of parity ignores the fact that regulatory parity only applies to similar services. The crux of this proceeding, and the overriding motivation behind the legislation, is to ensure that similar services are regulated similarly. Regulatory parity has no relevance to dissimilar and non-competitive services. For instance, if a private licensee decides to sell reserve capacity, it will not be directly competing with a commercial provider, as it will not have the capacity to offer its services to the public or to broad classes of the public and it is unlikely to be able to offer the same range of services. By its very nature, this ancillary private service cannot compete with commercial mobile services. Therefore, there is no need to attempt to create regulatory parity between these inherently unequal services.[31/]

UTC recommends that existing private land mobile radio systems should be classified as private mobile services if they lease reserve capacity which is less than their overall internal usage to other eligible end-users. As demonstrated above, because these services are not substitutes for commercial mobile services, regulatory parity is not warranted. Additionally, these systems are not offering commercial mobile service because

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[30/] Bell Atlantic, p. 14.

[31/] For this same reason, the 220-222 MHz licensees that operate on primarily a non-commercial basis should be permitted to offer reserve capacity on a for-profit basis.

they do not make service available to the public or a substantial portion of the public.

UTC supports the limited use of individual system capacity and service territory size information for determining whether a service that technically fits within the definition of "commercial mobile service" is nonetheless not the functional equivalent of a commercial mobile service. UTC recommends that the Commission not limit itself to these two factors in making this determination. Instead UTC agrees with Motorola that "[t]he functional equivalent test should be applied on a case-by-case basis and should be flexible enough to permit the consideration of numerous factors."[32/]

UTC supports the Commission's proposal to permit existing private land mobile licensees the flexibility to offer either commercial or private mobile service. This will permit licensees that are reclassified to determine whether they wish to continue to be regulated as a private mobile licensee by modifying their systems to provide only private mobile services. Equity also requires that existing private carriers be given the opportunity to provide private mobile services because the legislation has imposed additional regulatory constraints which did not exist when they made the business decision to begin providing service.

[32/] Motorola, p.10.

UTC opposes the suggestions of companies with cellular interests that existing common carrier licensees be permitted to offer either private or commercial mobile services.[33/] Permitting existing common carrier services that fit within the definition of commercial mobile services to offer private mobile services is clearly beyond the scope of this proceeding.[34/] Additionally, the adoption of this proposal would disrupt the commercial mobile services market as certain commercial customers would be faced with the prospect of being dropped by licensees electing to provide private mobile services. Permitting existing common carrier licensees to elect to provide private mobile services is also unnecessary to provide regulatory parity with PCS providers because private PCS licensees would not be in direct competition with commercial mobile services. Finally, unlike reclassification of private licensees, equity does not require that existing common carrier licensees be relieved of the common carrier obligations that they voluntarily undertook.

UTC opposes permitting licensees to offer both private and commercial mobile services under one license.[35/] As

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[33/] See, e.g., Ameritech, p. 3-4; NYNEX, p. 17; GTE, p. 11-12, McCaw, p. 12.

[34/] The NPRM's reference to the possible reclassification of common carrier services as private services refers only to those services that do not fit within the definition of commercial mobile services. NPRM, p. 15-16.

[35/] This is distinguished from the situation where reserve capacity is offered by a private carrier. In such a case, as (continued...)

Pacific/Nevada Bell points out, it would be "an administrative nightmare to police mixed use and to make certain that the appropriate portion was regulated appropriately." UTC urges the Commission to avoid the inherent administrative problems in attempting to apply dual service licensing to mobile services.

IV. REGULATORY CLASSIFICATION OF PCS SHOULD INCLUDE PRIVATE MOBILE SERVICE AS WELL AS COMMERCIAL MOBILE SERVICE

In its Comments, UTC supported the Commission's proposal to maintain a flexible approach to the licensing of PCS and permit both private and commercial applications. UTC was joined in its support by various parties, including NABER[36/], AMTA, Time Warner[37/], Telocator[38/], NYNEX[39/], New York Department of Public Service (NYDPS)[40/] and Motorola[41/]. UTC commends the Commission for its foresight that defining PCS as commercial-only would unnecessarily restrict the diversity of PCS applications.[42/] As UTC stated in its Comments, utilities and

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[35/](...continued)
explained in Section _____ above, the licensee is offering only a "private", albeit for-profit, mobile service.

[36/] NABER, p. 13-14.

[37/] Time Warner, p. 3-4.

[38/] Telocator, p. 18.

[39/] NYNEX, p. 17.

[40/] NYDPS, p. 9.

[41/] Motorola, p. 12.

[42/] NPRM, p. 17.

other public service/public safety organizations have security, priority and reliability concerns that warrant the allocation of private PCS licensees.[43/]

UTC strongly opposes USTA's unsupported statement that permitting private licensed PCS would not be in the public interest and would be contrary to the Commission's stated goals.[44/] USTA's approach is too rigid and would inhibit the full development of PCS. Providing only for commercial PCS services would not further the Commission's goal of providing regulatory parity because private and commercial PCS would be offering non-competitive services that would not warrant equal regulatory treatment. UTC agrees with Time Warner that "..the best way to nurture new services and provide for the development of numerous and diverse applications is to resist any premature urge to pigeon-hole PCS into a restrictive regulatory category."[45/]

[43/] Comments, p. 17. UTC also urges the Commission to permit the same flexibility for unlicensed PCS. Because there may be a demand for unlicensed commercial PCS service, as well as private PCS service, users of these systems should have the opportunity to choose which they will offer. See USTA, p. 9.

[44/] USTA, p. 9-10.

[45/] Time Warner, p. 4.